COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2515 **Cir. Ct. No. 2009CF2920**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY E. HENDERSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Anthony E. Henderson appeals the judgment convicting him of two counts of second-degree sexual assault of a child. He also appeals the order denying his postconviction motion. He was charged with one count of sexually assaulting J.C. and two counts of sexually assaulting R.S., but

was found guilty only for the two counts involving R.S. Henderson argues that the trial court erred by not allowing J.C.'s attorney to testify about a statement J.C. made to him about being a "lookout" for Henderson while he assaulted R.S. rather than an actual victim, and that the resulting error was not harmless. Henderson also argues that the trial court erred in denying his request for an evidentiary hearing on his ineffective assistance of counsel claim. We affirm.

BACKGROUND

¶2 On June 20, 2009, Henderson was charged with sexually assaulting J.C. and R.S., contrary to WIS. STAT. § 948.02(2) (2009-10).[1] The complaint alleged three counts of sexual assault: one involving J.C. as the victim, and two involving R.S. According to the complaint, the assaults took place in Henderson's basement apartment; R.S.'s family lived on the first floor of the house and J.C. lived a few houses away. Both J.C., who was fourteen, and R.S., who was fifteen, "reported that [Henderson] was giving them money and marijuana and cigarettes and always pressuring them to let [Henderson] do sexual things to them." The complaint related that Henderson performed oral sex on both boys, and further, that he "made threats to hurt the boys and was mad when he heard them talking about what he was doing to them." Henderson pled not guilty to the charges and the matter was set for trial.

¶3 While Henderson's case was pending, J.C.'s attorney, who represented J.C. in a delinquency action, sent the district attorney in the delinquency case an email providing, among other things, that J.C. told him that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

he "was not the victim" but was merely the "lookout" while Henderson assaulted R.S. The email read, in relevant part:

> At the last hearing, I attempted to call your attention [to J.C.]'s status as a witness in a Second Degree Sexual Assault of a Child case that is pending downtown. The case is State v. Anthony E. Henderson, Case No. 09 CF 2920. *[J.C.] tells me that he was not the victim, but witnessed the defendant assaulting a friend of his named [R.S.] Mr. Henderson allegedly asked [J.C.] to act as a "look-out,"* but [J.C.] told his mother what had happened and his mother contacted the police.

(Emphasis added.) Consistent with its ethical obligations to disclose potentially exculpatory information, the State disclosed the email to Henderson's attorney.

¶4 Before trial, the trial court conducted a hearing on the admissibility of J.C.'s statement. Henderson wanted to question both J.C. and J.C.'s attorney about the statement. The State's position was that J.C. could be questioned about the statement, but that the inquiry must be very limited so as not to disclose the particulars of J.C.'s delinquency case. At the hearing, the trial court concluded that it could not make a dispositive ruling on the scope of J.C.'s cross-examination until J.C. testified.

¶5 After the trial court decided to reserve its final ruling on the statement, the matter proceeded to trial. The State put on the testimony of J.C. and R.S., who testified consistent with the allegations in the complaint, and Milwaukee Police Detective Victor Wong, who interviewed the boys and searched Henderson's apartment.

¶6 When cross-examined about the statement made to his attorney about being the lookout during the assault of R.S., J.C. testified that he never told his lawyer that he was not actually assaulted. J.C. repeated this testimony on

re-direct examination and re-cross, testifying that he told his lawyer that he was the "lookout," but did not tell his attorney that Henderson had not assaulted him.

¶7 After the State rested its case, Henderson sought to question J.C.'s attorney in order to impeach J.C. J.C.'s attorney, Jamie Wiemer, was present for the hearing on this issue and informed the trial court that due to the attorney/client privilege he did not believe he could testify about what J.C. told him without J.C.'s authorization. J.C.'s attorney further explained that J.C. had not authorized him to testify regarding this matter.

¶8 The trial court prohibited testimony by J.C.'s attorney, concluding that J.C. had not "waived his attorney/client privilege in statements that he made to Mr. Wiemer in connection with his juvenile case … and which were revealed in limited fashion in an email exchange" between Attorney Wiemer and the district attorney assigned to J.C.'s juvenile case. Thereafter, Henderson testified in his own defense, denying that he performed oral sex on the boys.

¶9 The jury found Henderson not guilty of the charge involving J.C. and guilty of the two charges involving R.S. Henderson was sentenced and later filed a postconviction motion, which the trial court denied.

¶10 Henderson now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶11 Henderson's arguments on appeal relate to the trial court's decision to prohibit the testimony of J.C.'s attorney, Jamie Wiemer. Henderson argues that the trial court erred by not allowing Wiemer to testify, and that the resulting error was not harmless. Henderson also argues that the trial court erred in denying his

request for a ***Machner***[2] hearing on his ineffective assistance of counsel claim because trial counsel's allegedly incorrect analysis of the legal issues surrounding the admissibility of Wiemer's testimony persuaded Henderson that "he had no choice but to testify" even though he "would have preferred not to" do so.

¶12 This court need not delve into a lengthy analysis regarding whether the trial court erred in prohibiting Jamie Wiemer's testimony because any error resulting therefrom was harmless. *See* ***State v. Zien***, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on the narrowest possible ground). "This court has formulated the test for harmless or prejudicial error in a variety of ways." *See* ***State v. Harris***, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. Stated one way, our inquiry is whether "the evidence sufficiently undermines the court's confidence in the outcome of the judicial proceeding." *See* ***id.*** Stated another way, we ask "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Id.***, ¶43 (citation omitted). We consider several factors in our analysis, including the frequency of the error, the importance of the evidence that the trial court prohibited Henderson from introducing, the presence or absence of evidence corroborating or contradicting that evidence, "the nature of the defense, the nature of the State's case, and the overall strength of the State's case." *See* ***id.***, ¶45.

¶13 While Attorney Wiemer's testimony would have diminished J.C.'s credibility, it would not have made a difference in the outcome of the counts involving R.S.—*i.e.*, the counts in which Henderson was found guilty. Indeed, we agree with the trial court's conclusion that "Wiemer's testimony would have

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

corroborated the sexual assault allegations relating to [R.S.]" (Emphasis in original.) In addition, as the State points out in its brief, "R.S.'s testimony stands on its own merits and supports Henderson's convictions." R.S. testified that Henderson performed oral sex on him on two separate occasions. The first time Henderson gave R.S. $20 afterwards, and both times Henderson gave him marijuana. J.C.'s testimony supports R.S.'s in that J.C. testified that he acted as a lookout when Henderson was with R.S.; however, J.C. did not testify that he actually observed the assault. Thus, like the trial court, we "fail[] to perceive how evidence of [J.C.'s] purported recantation as a victim in this case would have significantly impacted … [*R.S.'s*] credibility." (Emphasis in original.) Therefore, we conclude that it is "'clear beyond a reasonable doubt'" that a rational jury would have found Henderson guilty even if Wiemer had been allowed to testify. *See* ***Harris***, 307 Wis. 2d 555, ¶43 (citation omitted).

¶14 Moreover, we are not persuaded by Henderson's argument that he would not have testified—and, consequently, would not have been subject to impeachment with his prior convictions—had the court allowed Attorney Wiemer to testify. First, contrary to what Henderson argues, the record shows that Henderson's decision to testify was not related to the trial court's ruling on Wiemer's decision to testify. Henderson advised the trial court that he wanted to testify before the court prohibited Wiemer's testimony. Second, we fail to see how Henderson's case would have been strengthened had he chosen not to testify—especially given that Wiemer's testimony would have, as noted, actually bolstered the State's case with respect to the charges involving R.S. As Henderson himself points out, this case hinged solely upon witness testimony. Officer Wong testified that a search of Henderson's apartment failed to produce any physical evidence of the alleged crimes. The jury essentially had to choose

between the testimony of the defendant and that of his alleged victims. Subtracting Henderson's testimony from this case would not have tipped the scales of justice in his favor.

¶15 Furthermore, because any error in not allowing Attorney Wiemer to testify was harmless, Henderson also fails to show that his attorney's performance prejudiced him, and his request for a ***Machner*** hearing must be denied. The standard we apply here is familiar. In ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, the Wisconsin Supreme Court reviewed the standard applied when defendants assert that they are entitled to a postconviction evidentiary hearing:

> First, [courts] determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that [appellate courts] review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing.

Id., 274 Wis. 2d 568, ¶9 (italics added; citations omitted). To succeed on this claim, Henderson must allege a prima facie claim of ineffective assistance of counsel, showing that trial counsel's performance was deficient and that this deficient performance was prejudicial. *See* ***State v. Mayo***, 2007 WI 78, ¶33, 301 Wis. 2d 642, 734 N.W.2d 115; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

¶16 The test for harmless error is "essentially consistent with the test for prejudice in an ineffective assistance of counsel claim" as articulated by ***Strickland***. ***State v. Harvey***, 2002 WI 93, ¶41, 254 Wis. 2d 442, 647 N.W.2d 189.

The only distinction between the two tests is on which party we assign the burden of proof: ordinarily, the one who benefits from an alleged error—in this case the State—must prove harmlessness, but in an ineffective assistance of counsel claim, the defendant—Henderson—must prove prejudice. *See* ***id.*** Thus, because we have already concluded that any error flowing from the prohibition of Attorney Wiemer's testimony is harmless, we must also conclude that Henderson cannot show prejudice on his ineffective assistance of counsel claim. *See* ***id.*** Without a showing of prejudice, Henderson's request for a ***Machner*** hearing fails. *See* ***Strickland***, 466 U.S. at 687, 697 (defendant alleging ineffective assistance of counsel must show *both* deficient performance and prejudice, and the claim fails if a showing cannot be made as to either prong of the analysis); ***Allen***, 274 Wis. 2d 568, ¶9.

¶17 Consequently, for all of the foregoing reasons, Henderson's appeal is denied, and his conviction and the order denying his postconviction motion is affirmed.

By the Court.—Judgment and order affirmed.

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